In The

Supreme Court of the United States

October Term, 1978

No. 78-1044

PASQUALE DI LUIGI,

Petitioner,

vs.

MAJOR GENERAL NICHOLAS P. KAFKALAS, Individually and in his capacity as Adjutant General of Pennsylvania,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Pasquale DiLuigi, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on September 19, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto (1a-14a). The opinions of the District Court for the Middle District of Pennsylvania are reported. *DiLuigi v. Mier,* 430 F. Supp. 1098 (M.D. Pa. 1977), and *DiLuigi v. Kafkalas,* 437 F. Supp. 863 (M.D. Pa. 1977).

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on September 19, 1978. This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the National Guard Technician's Act of 1968, 32 U.S.C. §709(e)(3) accords probationary or trial period employees a sufficient property interest in their employment so as to entitle them to due process procedures — notice and an opportunity to defend — prior to their dismissal.

2. Whether a probationary civilian technician may be discharged without cause as is presently defined by his employer pursuant to 32 U.S.C. §709(e)(3).

3. Whether the petitioner is entitled to reinstatement and back pay because he was discharged from his employment at the end of his probationary period without an assignment of "cause" being given and without an opportunity to defend.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 32, Sections 709 (a), (b), (d) and (e) as reproduced in the Appendix hereto (15a).

STATEMENT OF THE CASE

The present case arises as a result of the petitioner, Pasquale DiLuigi's discharge from his employment as a civilian technician employed by the Pennsylvania National Guard. The matter was tried before the Honorable Malcome Muir, United States District Judge for the Middle District of Pennsylvania. The lower court found that DiLuigi had been

discharged from his employment without due process of law and ordered him reinstated with partial back pay. The District Court's decision is embodied in its opinion on the defendant's motion for summary judgment, 430 F. Supp. 1098 (1977), and in its final opinion and orders (App. 1a-14a).

The majority of the relevant facts to the case were agreed to by the parties and so noted in the lower court's opinion.

1. The plaintiff, Pasquale DiLuigi, first enlisted in the Pennsylvania Army National Guard on November 26, 1974, for a period of one year. (Undisputed)

2. On October 19, 1975, the plaintiff extended his military enlistment in the Pennsylvania National Guard for one year. (Undisputed)

3. Again on November 1, 1976, the plaintiff extended his enlistment in the military, this time for a period of three years. (Undisputed)

4. The three enlistments referred to in the preceding paragraphs were voluntary. (Undisputed)

5. On June 16, 1975, while a member of the Pennsylvania National Guard, the plaintiff was hired as a National Guard technician on a trial or probationary basis for one year. The plaintiff thereafter was employed at the Army Aviation Support Facility (AASF), located at Indiantown Gap, Pennsylvania. (Undisputed)

6. The defendant, Major General Nicholas P. Kafkalas, is the Adjutant General of the Pennsylvania Army National Guard. (Undisputed)

7. The plaintiff was hired by the AASF as an electronics mechanic pursuant to the authorization set forth in the National

Guard Technicians Act of 1968, as amended, 32 U.S.C. §709(a). (Undisputed)

8. The plaintiff was aware at the time he was first employed by the AASF as a technician that his employment was probationary in nature and the trial period for employment was to last one year.

9. By order of the Secretary of the Army and Secretary of the Air Force, the Federal Personnel Manual, the Federal Personnel Manual Supplements and the Technician Personnel Manual are the official regulations governing the administration of technician personnel. The National Guard Bureau issues Technician Personnel Pamphlets (TPP) which are the daily working non-mandatory guidelines used by supervisors for technician personnel administration. (Undisputed)

10. On March 23, 1976, during the ninth month of plaintiff's employment, Captain Edgar exhibited to Mr. DiLuigi a copy of his NGB Form 2 recommending that Mr. DiLuigi be separated from the federal service for the reason shown on an attachment thereto (15a).[1]

11. On March 26, 1976, the plaintiff was given his formal notice that he would be terminated effective April 30, 1976. (Undisputed)

12. Although plaintiff signed on March 23, 1976 a copy of NGB 2, Technician Performance Rating, in which his employer, Captain Edgar, had recommended his separation from the federal service, he received no copy thereof until a superior officer had signed it under date of March 25, 1976.

13. The Technician Performance Rating Sheet contained the following reason for DiLuigi's proposed termination:

1. All parenthetical references to the record are to the printed appendix before the court below.

> "The Technician's conduct and general character traits are such that retention in Federal service is not recommended."

14. Contained in both TPP 904, as well as the Technician Personnel Manual 700/735, are disciplinary and adverse action regulations (18a-39a).

15. At no time was DiLuigi given a written statement setting forth the facts upon which Captain Edgar and Colonel Hanna based their decision to recommend non-retention.

16. Neither the notice of non-retention nor the notice of termination apprised DiLuigi that he had any right to reply to the termination action (14a-17a).

17. When the matter came on for trial DiLuigi offered to present testimony going to the merits of the allegations to prove that they (1) were pretextual and (2) did not rise to the level of just cause required by both the statute (32 U.S.C. §709(e)(3)) and the agency's regulations (22a).

18. The lower court precluded the plaintiff from presenting such evidence indicating that the merits of the charges were not relevant if indeed DiLuigi were deprived of due process in the manner of his discharge (5a-13a).

19. DiLuigi has consistently denied doing any act that would justify his termination. Existing regulations, applicable to all non-probationary technicians, establish a "for cause" standard by which to measure a technician's behavior (52a-57a). These same regulations also establish a due process procedure through which a technician may seek to vindicate his denial of charges leveled against him (31a-44a). No other regulations existed at the time of DiLuigi's employment to define the concept of just cause for discharge.

REASONS FOR GRANTING THE WRIT

1. The decision of the Third Circuit Court of Appeals conflicts with decisions of this Court guaranteeing due process rights to federal employees who have a property interest in their employment.

2. The decision of the Third Circuit misconstrues a congressional enactment giving important rights to civilian employees of the National Guard who by virtue of their civilian employment must also maintain their membership in the military reserve of the United States.

A.

The National Guard Technicians Act of 1968 creates a property interest in a civilian technician's employment regardless of his "conditional" or non-conditional status.

The National Guard Technicians Act of 1968, 32 U.S.C. §709, *et seq.*, authorized the Secretary of the Army to hire civilian employees to perform certain jobs for the various State National Guard units. It further requires that these civilian employees must enlist in the National Guard while so employed, 32 U.S.C. §709(b). Further, these are non-civil service jobs, 32 U.S.C. §709(d). The Act then provides:

> "Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned —
>
> * * *
>
> (3) a technician may, at any time, be separated from his technician employment for cause by the adjutant general of the jurisdiction concerned." 32 U.S.C. §709(e)(3).

The statute draws no distinction between "conditional" or full-time employment, nor does it give the Secretary express authority to create a "conditional" or probationary form of employment.

By virtue of its express language, Congress granted to all civilian employees of the National Guard an interest in continued employment beyond an employment at will. *Tennessee v. Dunlap*, 426 U.S. 312, 96 S. Ct. 2099; *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694; *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701; *Arnett v. Kennedy*, 416 U.S. 134, 94 S. Ct. 1633. In *Arnett v. Kennedy, supra*, the Supreme Court reviewed similar statutory language contained in the Civil Service (Lloyd-LaFollette) Act. The Lloyd-LaFollette Act provides:

> "An individual in the competitive service may be removed or suspended without pay only for such cause as will promote the efficiency of the service." 5 U.S.C. §7501(a).

In its plurality opinion, the Court concluded:

> "Here appellee did have a statutory expectancy that he not be removed other than for 'such cause as will promote the efficiency of [the] service'." 416 U.S. at 151-152; 94 S. Ct. at 1643.

Even clearer language was used by Mr. Justice Powell in his concurring opinion:

> "The federal statute guaranteeing appellee continued employment absent 'cause' for discharge conferred on him a legitimate claim of entitlement which constituted a 'property' interest under the Fifth Amendment. Thus termination of his employment requires notice and a hearing." 416 U.S. at 166, 94 S. Ct. at 1650.

The concept that a statutory or contractual need for "cause" gives rise to a protected property interest in employment is now a common thread in the due process decisions of the Supreme Court. In *Bishop v. Wood,* 426 U.S. 341, 96 S. Ct. 2074 (1976), the Court again reiterated that in *Arnett, supra,* "[T]he Court concluded that because the employee could be discharged for cause, he had a property interest which was entitled to constitutional protection." 96 S. Ct. at 2078, n. 8.

So, too, the present statutory language is unambiguous. It should not be seriously argued that the Guard could, by regulation, nullify this express congressional grant of a protected property interest.

The above cited portion of the National Guard statute is accompanied by two additional "causes" for discharge. The most prominent of which is the separation from National Guard Service by the employee. Only recently, *Tennessee v. Dunlap, supra,* this Court construed this statute as it pertained to an employee who lost his civilian employment when he was prevented from re-enlisting in his military unit. While finding that the *military* decision was not reviewable and hence, his discharge was automatic, the Court noted:

> "The clear and sole import of subsection (3), then, is that if a technician remains a member of the National Guard and is otherwise eligible for continued employment under subsections (1) and (2), he may nevertheless be discharged for cause. . . . the property interest it [709(e)(3)] creates in continued employment is confined in all events, to the guardman's term of enlistment." *Tennessee v. Dunlap,* 96 S. Ct. 2099 at 2101-2102 (1976).

It would appear that the Court believed that the statute did create a "property interest" even if that interest was conditioned

on *active* military service. If that interest exists, it must be protected by the due process clause of the Fifth Amendment to the United States Constitution. *Perry v. Sindermann, supra.*

A "probationary" civilian technician is no less the recipient of this protected interest than is a regular employee. The Act itself makes no distinction between "probationary" and regular employment. The Guard Bureau argues, however, that such authority must be implied because the statute gives the Secretary (of the Army) the power to make regulations, and by regulation, the Secretary has created a "probationary" status employee. No regulatory power can detract from the express congressional mandate that a civilian technician may only be discharged for "cause".

By contrast, Congress explicitly gave the President the power to create probationary employment under the Lloyd-LaFollette Act. The Civil Service law provides:

> "The President may prescribe rules which shall provide, as nearly as conditions of good administration warrant, that there shall be a period of probation before an appointment in the competitive service becomes absolute." 5 U.S.C. §3321.

No such analagous provision in the National Guard Technicians Act of 1968 exists and there is no probationary/permanent dichotomy created by this latter Act. See *Sampson v. Murray,* 415 U.S. 61, 94 S. Ct. 937.

The Supreme Court noted that the Civil Service regulations that expanded upon Lloyd-LaFollette were "consistent with" the statute. They enlarged upon, but did not detract from the statutory grant of the property interest and its due process protections. 415 U.S. at 81-82.

In the present case, the Secretary would import the Civil Service limitations on probationary employment onto the technicians employment despite the clear difference in the statutory authority. Such a result would limit the congressionally mandated tenure which is available to all technicians and violate the due process clause, *Perry v. Sindermann, supra.*

The Government's argument — that the Secretary of the Army is entitled to interpret 32 U.S.C. §703(e)(3) to apply only to non-probationary technicians — misses the mark. In the first place the Government concedes that 32 U.S.C. §§709(e), (1), (2), (4), (5) and (6) do apply to probationary employees. This was precisely the reason why DiLuigi was given thirty (30) days notice of his discharge (22a, 96a). There is no cannon of construction that would allow the Secretary to carve from the statute §709(e)(3) and hold it in abeyance for newly hired employees.

Secondly, the newly hired technician's interest in his employment is greater than a civil servant's comparative interest, while the Government's corresponding interest in summary discharge is weak. Compare *Arnett v. Kennedy, supra.*

Obviously employment alone is a substantial interest which entitles a plaintiff to notice and hearing, even if the evidentiary hearing is subsequent to the effective date of discharge. *Arnett v. Kennedy, supra.* The private interest in the present circumstances extends further. Whether to get the job or keep the job the civilian technician must enlist in or extend his enlistment in the military, *i.e.,* the National Guard. This military commitment, while voluntary, nevertheless makes it more important to the technician that he be entitled to test the "cause" of his discharge in the traditional crucible of evidentiary hearing with the right of cross-examination and confrontation. *Greene v. McElroy,* 360 U.S. 474 (1959). The military obligation, of course, continues even after the reason for its extension ends.

This military obligation is significant. It requires 48 days of active military training on week-ends, two weeks of summer training, and strict adherence to the military code of justice. 32 U.S.C. §501 *et seq.* It is thus respectfully submitted that the private interest at stake is much greater in the present case than is that of a civil servant.

Arnett v. Kennedy, 416 U.S. 134, 94 S. Ct. 1633 provides the proper framework from which to analyze the Government's contention that the Secretary's regulations may limit the statutory grant of tenure.

In the plurality opinion, Mr. Justice Renquist found that Congress could appropriately limit procedural due process where it was up to Congress to grant the property interest in the first place. Thus, he found constitutional 5 U.S.C. §7501 which first grants the right of tenure for civil servants, but then sets forth a limited procedural challenge for removal for "cause". 416 U.S. at 152, 94 S. Ct. at 1643. Of course, in enacting the National Guard Technicians Act of 1968, 32 U.S.C. §709(e), Congress enacted no such comparable procedural limitation. The Act does provide for a 30 day notice of termination, but this applies to all technicians, not just to "conditional" employees. And the Act does not specifically exclude a due process hearing as does the Lloyd-LaFollette Act.

Three Justices of the Supreme Court, however, disagreed with Mr. Justice Renquist. In their concurring opinions they specifically reject the idea that Congress can limit due process procedures otherwise mandated by the Constitution. Mr. Justice Powell stated:

> "It seems to me that this approach [allowing Congress to define the limits of due process] is incompatible with the principles laid down in *Roth* and *Sindermann.* Indeed, it would lead directly to the conclusion that whatever the

> nature of an individual's statutorily created property interest, deprivation of that interest could be accomplished without notice or a hearing at any time. This view misconceives the origin of the right to procedural due process. That right is conferred, not by legislative grace, but by constitutional guarantee. *While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."* (Emphasis supplied.)416 at 166-167, 94 S. Ct. at 1650.

Indeed, if Congress cannot limit essential minima of due process, the agency can hardly do so by regulation.

Mr. Justice White reiterated this view, and citing *Greene v. McElroy,* 360 U.S. 474, 79 S. Ct. 1400 (1959), stated:

> "Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process" and it has been "the Court's concern that traditional forms of fair procedure not be restricted by implication or without the most explicit action by the nation's lawmakers. . . . " *Id.,* at 507-508, 79 S. Ct. at 1419, 416 U.S. at 183, 94 S. Ct. at 1658.

Since Congress has not explicitly limited the procedural due process rights of civilian technicians, *Arnett* must stand for the proposition that the traditional forms of due process, adequate notice and a prior hearing be made available to the petitioner.

CONCLUSION

For the foregoing reasons, Pasquale DiLuigi, respectfully prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

MERANZE, KATZ, SPEAR
& WILDERMAN

s/ Bruce E. Endy
Attorney for Petitioner

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 77-2433
77-2434

PASQUALE Di LUIGI,

v.

MAJOR GENERAL NICHOLAS P. KAFKALAS, Individually and in his capacity as Adjutant General of Pennsylvania,

Pasquale DiLuigi,
Appellant in 77-2433

Nicholas P. Kafkalas, etc.,
Appellant in 77-2434

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 76-1332)

Argued July 26, 1978

Before: ADAMS, WEIS and HIGGINBOTHAM, *Circuit Judges.*

(Opinion filed Sep. 19, 1978)

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OPINION OF THE COURT

WEIS, *Circuit Judge.*

Whether a newly appointed National Guard technician has a property interest in his employment is the nub of this appeal. The district court determined that administrative regulations imposing a period of probation without tenure were inconsistent with a statutory provision that an employee may be discharged only for cause.[1] After an analysis of statutory purposes and

1. The opinions of the district court are reported at DiLuigi v. Mier, 430 F. Supp. 1098 (M.D. Pa. 1977), and DiLuigi v. Kafkalas, 437 F. Supp. 863 (M.D. Pa. 1977).

legislative history, we conclude that the regulations may be read in harmony with the statute. Accordingly, we vacate the judgment of the district court in favor of the plaintiff.

Plaintiff was hired as an electronics mechanic for the Pennsylvania National Guard under the provisions of the National Guard Technician Act of 1968, 32 U.S.C. §709. His appointment began on June 16, 1975, and was stated in writing to be conditioned upon completion of a one-year trial period. Despite in-grade pay increases during his first six months on the job, plaintiff was advised on March 23, 1976 that his employment would be terminated on the recommendation of his superior, Captain Edgar. Reporting to the facility commander, Colonel Hanna, Edgar had written that the plaintiff's "conduct and character traits are such that retention in Federal service is not recommended." This evaluation was made pursuant to a regulation requiring that a supervisor submit a recommendation as to further employment after reviewing the performance and conduct of a technician during the first nine or ten months of service.

Within a few days after he was apprised of the suggested discharge, the plaintiff met with Colonel Hanna at least four times to discuss the evaluation. Captain Edgar and plaintiff's employee representative were present at various times and the plaintiff responded to the complaints against him. Nevertheless, on March 25, 1976, Hanna told plaintiff that Edgar's recommendation would be approved, and on March 29, the Adjutant General's office wrote that the discharge would be effective April 30, 1976. The letter gave as reasons for termination "[i]nability to cope with certain responsibilities inherent with your position . . ." and "[i]nability to grasp and maintain basic fundamentals required of your position. . . ."

Plaintiff then turned to the district court, alleging that because he had been terminated without cause and had not been

given adequate notice or hearing, he was entitled to reinstatement, back pay, and punitive damages. Although the source of the plaintiff's cause of action was somewhat uncertain at first, eventually the district court determined that the claims were within its jurisdiction under the Tucker Act, 28 U.S.C. §1346(a)(2), and a monetary award could be based upon the Back Pay Act, 5 U.S.C. §5596(b).[2]

The district court concluded that the plaintiff had a property right to continued employment under the terms of the Technician Act and could not be terminated without notice and a hearing. After a bench trial, the court found that the written notice afforded the plaintiff had been inadequate since it gave him only "the vaguest idea of the reasons for his discharge" and that the oral reasons given by Hanna and Edgar were indefinite.

---

2. 28 U.S.C. §1346 provides that a district court has original jurisdiction of a claim against the United States not exceeding $10,000. Because of this jurisdictional limit, the plaintiff agreed to waive damages in excess of $10,000. *See* Commonwealth of Pennsylvania v. National Ass'n of Flood Ins., 520 F.2d 11, 25 (3d Cir. 1975), *citing* Perry v. United States, 308 F. Supp. 245 (D. Colo. 1970), *aff'd*, 442 F.2d 353 (10th Cir. 1971).

The Tucker Act, being only a jurisdictional statute, does not create a substantive right enforceable against the United States for money damages. United States v. Testan, 424 U.S. 392, 398 (1976). A claim for back pay by a federal employee, however, is authorized by 5 U.S.C. §5596(b) which allows retroactive recovery of wages whenever an employee "is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that had resulted in the withdrawal or reduction of all or part of the pay . . . of the employee . . . ." *See also* Polos v. United States, 556 F.2d 903, 905-06 & n.5 (8th Cir. 1977).

Jurisdiction of the district court under §1346 is concurrent with that of the Court of Claims, which is authorized in any case within its jurisdiction, "[t]o provide an entire remedy and to complete the relief afforded by the judgment, as an incident of and collateral to any such judgment, [to] issue orders directing restoration to office or position, . . . and such orders may be issued to any appropriate official of the United States." 28 U.S.C. §1491. *See* Richardson v. Morris, 409 U.S. 464 (1973) (per curiam).

Without determining whether the various pretermination interviews satisfied the requirement of a hearing, the court decided that lack of adequate written notice constituted a deprivation of due process. The Adjutant General was thereupon directed to reinstate the plaintiff and reimburse him for back pay. The defendant, however, was given leave to institute new termination procedures complying with due process after plaintiff had been reinstated. In due course, plaintiff was reemployed, but was again discharged after new proceedings were completed.

In this appeal, the defendant challenges the order directing reinstatement and awarding back pay. The plaintiff cross-appeals on a number of grounds but essentially from the district court's refusal to preclude the defendant from instituting a new termination proceeding.

The National Guard Technician Act of 1968 was a congressional response to problems stemming from the ambiguous employment status of full-time civilian technicians who serve in National Guard units throughout the country. They perform such essential and varied services as maintenance of equipment and facilities, training, support of aircraft operations, and clerical functions. Although these technicians, previously called caretakers and clerks, had been paid by the federal government, most were required to hold concurrent National Guard membership as a condition of employment, and were considered state employees. Before the Act's passage, no uniform national programs for their retirement and fringe benefits had been established. Moreover, the uncertain legal status of the technicians led to conflicting court decisions in third party accident claims against the government. The Technician Act gave these civilians federal employee status. To clarify supervisory functions, adjutant generals, although state officers, were made responsible for the technicians' employment and termination of service.

Appendix A

Both House and Senate Reports indicate that the technicians were to be treated insofar as possible like other federal employees covered by the civil service legislation, and, where divergence was necessary, specific provisions were drafted. Because of the requirement for maintaining membership in the Guard itself, about 95% of the technicians were to be accorded noncompetitive federal status while 5%, principally clerk-typists and security guards who were not required to have military status, were to be placed in the competitive civil service classification. *See* S. Rep. No. 1446, 90th Cong., 2d Sess. 5; H.R. Rep. No. 1823, 90th Cong., 2d Sess. 6, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 3318, 3324.[3]

The crux of this case is the interpretation to be given the termination segment of the Act, 32 U.S.C. §709(e), which reads:

3. The competitive service in the executive branch consists of all civil service positions except positions to which appointments are made by nomination for Senate confirmation and those specifically excepted by statute. *See* 5 U.S.C. §§2102(a)(1), 2103(a). Congress delegated broad power to the President to establish qualifications and conditions of employment. 5 U.S.C. §3301. The President in turn delegated much of this authority to the Civil Service Commission by Executive Order. Except as expressly provided, rules promulgated by the Commission do not apply to the excepted service. *See* 5 C.F.R. §1.1 (1978).

> "[A]ppointments and position changes in the excepted service shall be made in accordance with such regulations and practices as the head of the agency concerned finds necessary." 5 C.F.R. §6.3(b) (1978).

The Technician Act provides:

> "(d) A technician . . . is an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States. However, a position authorized by this section is outside the competitive service if the technician employed therein is required under subsection (b) to be a member of the National Guard." 32 U.S.C. §709(d).

Appendix A

> "(e) Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned —
>
> * * *
>
> (3) a technician may, at any time, be separated from his technician employment for cause by the adjutant general of the jurisdiction concerned."

The district court reasoned that the phrase, "for cause," created in the plaintiff a property interest in continued employment and rejected defendant's contention that regulations promulgated by the Secretary of the Army created a class of probationary employees who had not attained tenure status.[4] Remarking that no regulation explicitly negated a probationer's entitlement to a "for cause" termination, the court stated that the regulations only set out the process due such an employee when he is discharged and, in any event, a regulation in conflict with §709(e)(3) would be invalid.

Facially there may appear to be some discrepancy between the precise language of the statute and the regulations, but to determine whether there is support for the Secretary's position, it is important to examine the legislative history. A review of that source convinces us that the establishment of a one-year probationary period is in accord with congressional intent in passing the Act.

4. In Tennessee v. Dunlap, 426 U.S. 312, 316 (1976), the Court, in discussing the validity of due process claims of a technician whose term of enlistment in the National Guard had expired, acknowledged that the section creates a property interest in continued employment although confined to the guardsman's term of enlistment. In that case, however, the Court had no occasion to consider whether the interest arose before the technician had completed his probationary or trial period.

Congress was conscious of the fact that most of the technicians would be in the noncompetitive or excepted category of civil service employment and hence, would not have the benefit of tenure or the procedural protection provided competitive-classified employees. Accordingly, the clear import of the termination for cause provision was to accord all technicians an assurance of continuing employment similar to that given other federal employees. Indeed, the few technicians whose status was classified as competitive unquestionably were entitled to this. There is no indication that Congress intended to grant greater advantages to 95% of the technicians than other civil service employees, nor to deny the government the opportunity to further evaluate these new employees during a trial period.

Although the statute does not mention a probationary stage for new employees, provision for some trial period by the "Secretary concerned" is not inconsistent with the congressional purpose. In discussing the credit for past service to be afforded the newly assimilated federal technicians, both legislative reports state:

> "For 95 percent of the technicians, who will be required to hold military membership in the Guard and who will be in the noncompetitive category, past service is relevant *for the purpose of completing the 1-year probationary period of Federal employment which is generally required prior to entering a career status.*
>
> "For 5 percent of the technicians who will be in the competitive category, past service is significant not only *for the 1-year probationary period* but for credit in order to complete the 3-year period of career conditional employment prior to becoming a career employee." S. Rep. No. 1446, 90th Cong., 2d Sess. 7; H.R. Rep. No. 1823, 90th Cong., 2d Sess. 8, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 3318, 3326 *(emphasis added).*

Pursuant to the statutory direction, the Secretary of the Army compiled regulations styled the Technicians Personnel Manual (TPM).[5] In discussing a probationary interval for further evaluation of the fitness and capacity of new technicians, the Manual reads:

> "1-6. TRIAL PERIOD
>
> a. The trial period is the final and highly significant step in the overall evaluation of a technician. It provides the final indispensable test, that of actual performance on the job, which no preliminary evaluation can approach in validity. During the trial period, the technician's conduct and performance in the actual duties of

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5. The Technician Personnel Manual describes itself as the "official publication containing instructions to the several States . . . on matters of National Guard technician personnel management . . . prescribed under 32 U.S.C. §709 . . . for the administration of National Guard technicians," and modifies and supplements civil service personnel regulations and the Civil Service Commission's Federal Personnel Manual. TPM 001, Introduction (Aug. 21, 1972). Technician Personnel Pamphlets (TPP), daily working guidelines, are used by supervisors for administration of technical personnel.

TPP 904 (May 25, 1972) provides:

> "3-7. Trial Periods in the Excepted Service.
>
> "Technicians appointed in the excepted service are required to serve a trial period of 1 year. During the trial period their conduct and performance may be observed, and they may be separated without undue formality if circumstances so warrant."

his position may be observed, and he may be separated from technician employment without undue formality . . . .

* * *

4-3. CONTROL IN THE EXCEPTED SERVICE

a. Initial appointments in excepted positions will require incumbents to serve a 1-year trial period." TPM 300: 302.1, 300.4 (Sept. 18, 1972).

The Manual further provides that technicians are subject to civil service laws and regulations except as modified by the TPM. References are made to the fact that provisions of subchapter 8, chapter 315 of the Federal Personnel Manual, governing probationary competitive service employees are also applicable to technicians in the excepted (noncompetitive) service. The Federal Personnel Manual in turn tracks 5 C.F.R. §315.802-.805 (1978) in providing for a probationary period of one year, permitting termination during this period if the employee fails to demonstrate fully his qualifications for continued employment and requiring that termination be in writing with reasons, which shall, "at a minimum, consist of the agency's conclusions as to the inadequacies of his performance or conduct."

Thus, it is clear that there are incorporated and expressed regulations promulgated by the Secretary of the Army requiring a trial period of one year. The action taken by the Adjutant General conforms to the requirements of the Guard as well as the civil service regulations pertaining to other probationary employees. The net result is that plaintiff received the same treatment as any civil service probationary employee consistent with congressional purpose in enacting the Technician Act. The

fact that 32 U.S.C. §709(e) does not specifically mention a trial or probationary period does not prevent a conclusion that such an exception to the cause requirement exists.

Congress clearly did not intend the statutory provisions to be all inclusive as to the terms of employment. In both subsection (a) of §709, relating to employment, and subsection (e), referring to termination, the statute precedes its authorization by using the language, "under regulations prescribed by the Secretary." The district court reasoned that Congress, by inserting the phrase in the latter subsection, did not sanction rules establishing a probationary period during which technicians could be discharged for less than cause. The court found particularly significant the fact that the "cause" provision was "*under*" rather than "*subject to*" regulations promulgated by the Secretary.

We are not persuaded that Congress attached any different meaning to "under" rather than "subject to" and, indeed, the legislative history uses the phrases interchangeably. The legislative reports, for example, use the words, "pursuant to secretarial regulations" in discussing an adjutant general's authority to employ and discharge technicians.[6] Legislative reliance upon regulations to flesh out the statutory skeleton, moreover, is consistent with the procedure followed in the civil service field. We conclude that the regulations establishing a trial or probationary period are not in conflict with the statute, but

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6. In referring to the authority of the adjutant general, the House Report reads:

> "The bill provides that the Adjutant General shall accomplish any actions involving reduction in force, removal, or an adverse action involving *discharge* from technician employment, suspension, furlough without pay, or reduction in rank or compensation. This authority would be *subject to* secretarial regulations."

rather are in concert with congressional intention to put the technicians in the same position as civil service employees to the extent reasonably possible. In the setting of the Technicians Act, therefore, the regulations and statute should be construed as a whole and only in the instance of clear inconsistency should a regulation be nullified.

We do not overlook the fact that since plaintiff received written notice that his appointment was on a trial basis, he had no real expectancy of tenure before entering permanent employment. *See Board of Regents v. Roth,* 408 U.S. 564, 577-78 (1972); *Perry v. Sindermann,* 408 U.S. 593, 599-603 (1972). Although he did have certain procedural rights in connection with his termination, these rested not on a constitutional foundation but rather on the regulations themselves, admittedly satisfied by the Adjutant General. Consequently, the plaintiff was properly discharged.[7]

The judgment of the district court will be vacated and judgment will be entered for the defendant.

TO THE CLERK:

Please file the foregoing opinion.

Circuit Judge

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7. Arnett v. Kennedy, 416 U.S. 134 (1974), holds that a post-termination hearing satisfies due process requirements in an employee discharge case. Our resolution of this appeal makes it unnecessary to consider whether an order for post-termination notice and hearing, rather than reinstatement, would be the proper remedy.

UNITED STATES COURT OF APPEALS
for the Third Circuit

Nos. 77-2433/77-2434

DI LUIGI, PASQUALE,

Appellant in No. 77-2433

vs.

KAFKALAS, NICHOLAS P., Individually and in his capacity as Adjutant General of Pennsylvania,

Appellant in No. 77-2434

(D.C. Civil No. 76-1332)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Present: ADAMS, WEIS and HIGGINBOTHAM, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel on July 26, 1978.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District

Appendix A

Court, filed August 29, 1977, be, and the same is hereby vacated and judgment entered for the defendant.

ATTEST:

s / Thomas F. Quinn
Clerk

September 19, 1978

APPENDIX B — UNITED STATES CODE, TITLE 32, SECTIONS 709(a), (b), (d) AND (e)

§709(a)

"(a) Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, and subject to subsection (b) of this section persons may be employed as technicians in —

(1) the administration and training of the National Guard; and

(2) the maintenance and repair of supplies issued to the National Guard or the armed forces."

§709(b)

"(b) Except as prescribed by the Secretary concerned, a technician employed under subsection (a) shall, while so employed, be a member of the National Guard and hold the military grade specified by the Secretary concerned for that position."

§709(d)

"(d) A technician employed under subsection (a) is an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States. However, a position authorized by this section is outside the competitive service if the technician employed therein is required under subsection (b) to be a member of the National Guard."

§709(e)

"(e) Notwithstanding any other provisions of law and under regulations prescribed by the Secretary concerned —

(1) a technician who is employed in a position in which National Guard membership is required as a condition of employment and who is separated from the National Guard or ceases to hold the military grade specified for his position by the Secretary concerned shall be promptly separated from his technician employment by the adjutant general of the jurisdiction concerned;

(2) a technician who is employed in a position in which National Guard membership is required as a condition of employment and who fails to meet the military security standards established by the Secretary concerned for a member of a reserve component of the armed force under his jurisdiction may be separated from his employment as a technician and concurrently discharged from the National Guard by the adjutant general of the jurisdiction concerned;

(3) a technician may, at any time, be separated from his technician employment for cause by the adjutant general of the jurisdiction concerned;

(4) a reduction in force, removal, or an adverse action involving discharge from technician employment, suspension, furlough

without pay, or reduction in rank or compensation shall be accomplished by the adjutant general of the jurisdiction concerned;

(5) a right of appeal which may exist with respect to clause (1), (2), (3), or (4) shall not extend beyond the adjutant general of the jurisdiction concerned; and

(6) a technician shall be notified in writing of the termination of his employment as a technician and such notification shall be given at least thirty days prior to the termination date of such employment."